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No. 10-826

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GUY PIERCE, Warden, Pontiac Correctional Center,

Petitioner,

v.

HENRY GRIFFIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED WHERE THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE LEVEL OF DEFERENCE REQUIRED UNDER THE AEDPA FOR A STATE COURT FINDING OF FACT FOLLOWING A BENCH TRIAL IN WHICH THE TRIAL JUDGE DETERMINED THAT OMITTED EVIDENCE WOULD NOT HAVE A REASONABLE PROBABILITY OF CHANGING THE OUTCOME.

Petitioner filed a petition for writ of certiorari arguing that, when reviewing an ineffective assistance of counsel at sentencing claim brought under 28 U.S.C § 2254(d) and the AEDPA, the Seventh Circuit refused to defer to the state court factual determinations made by the very judge who made the original sentencing determination. (Pet. 8.) Petitioner argued that, in a similar circumstance, the Second Circuit did defer to the state court findings of fact. (Pet. 11.) Thus, petitioner argued that there is a conflict among the circuits in AEDPA cases in terms of the level of deference given to state court findings. (Pet. 10-12.)

Respondent filed a brief in opposition to certiorari in which he asserts that no conflict exists among the circuits regarding how 28 U.S.C § 2254(d) and the AEDPA applies in these cases. (Opp. 8-9.) Respondent insists that the cases relied on by petitioner do not support the argument in favor of certiorari and that, contrary to petitioner's assertions, the cases all employ the same standard of review. (Opp. 9-11.)

Respondent is mistaken. The cases cited by petitioner highlight the disparity among the circuits in terms of the

deference they give to the state court findings. (Pet. 10-12.) In *Dunham v. Travis*, 313 F.3d 724 (2d Cir. 2002), the state court trial judge, who sat as trier of fact, rejected a *Strickland* claim, finding that the omitted impeachment evidence would not have changed the outcome of the trial. The Second Circuit deferred to that state court finding. In contrast, in the case at hand, the Seventh Circuit conducted its own "objective evaluation of the evidence" because "the question is not whether a particular judge would have imposed a different sentence, but rather whether there was a 'reasonable probability' that the sentence would have been different." *Griffin*, No. 09-3138 (Slip op. 28) (App. A at 29). The Seventh Circuit's discussion of the *Strickland* issue was totally devoid of even a single reference to the deference normally accorded under the AEDPA to state court findings.

Moreover, contrary to respondent's assertion, petitioner never once suggested that the circuit courts of appeal were citing different standards of review. (Opp. 10.) Rather, the conflict lies in the level of deference the courts are giving to the state court findings. (Pet. 10-12.)

Petitioner acknowledges that he referred to *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009), as a case in which the jury imposed sentence when, in fact, the jury only recommended the death sentence and the court imposed it. (Petitioner. 9; Opp. 11.) Although petitioner misspoke, the point remains the same: more deference should be accorded to a sentence imposed by the court than a jury when, post-sentencing, an inmate presents omitted mitigation and the sentencing judge says that evidence would not have changed the outcome.

Moreover, as highlighted in this Court's recent decision in *Harrington v. Richter,* 2011 U.S. LEXIS 912 (January 19, 2011), there is a difference between properly applying the AEDPA standard of review and merely paying lip service to it.

In *Richter,* as in the case at hand, the inmate raised a post-conviction claim of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984). *Richter,* 2011 U.S. LEXIS 912 at 18-19. When the California state court denied the claim, Richter raised it in federal court in a petition for writ of habeas corpus under 28 U.S.C § 2254(d). *Richter* at *20. The district court denied the writ, but the Ninth Circuit Court of Appeals, sitting *en banc,* reversed. *Id.* at *20. The United States Supreme Court reversed the *en banc* decision, holding that the Ninth Circuit failed to "accord required deference to the decision of a state court" and so the circuit court's opinion amounted to "clear error." *Id.* at *12-13. The Court explained as follows.

> Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a *de novo* review, 578 F.3d at 952; and after finding a *Strickland* violation, it declared, without further explanation, that the "state court's decision to the contrary constituted an unreasonable application of *Strickland*." 578 F.3d at 969. AEDPA demands more. *Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that*

> *those arguments or theories are inconsistent with the holding in a prior decision of this Court.* The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)." *Lockyer* v. *Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).
>
> The Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review: Because the Court of Appeals had little doubt that Richter's *Strickland* claim had merit, the Court of Appeals concluded the state court must have been unreasonable in rejecting it. This analysis overlooks arguments that would otherwise justify the state court's result and ignores further limitations of § 2254(d), including its requirement that the state court's decision be evaluated according to the precedents of this Court. See *Renico* v. *Lett*, 559 U.S. ___, ___130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (slip op., at 11-12). It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable. See *Lockyer*, *supra*, at 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144.

Richter, id. at *28-29 (emphasis added).

In the case at hand, the United States Court of Appeals for the Seventh Circuit also conducted a *de novo* review of Griffin's ineffective assistance of counsel claim. The court, relying on its own precedent, asserted:

> ...it is unclear to us how much weight the state supreme court gave to Judge Strayhorn's statement that the introduction of the proffered evidence would not have changed Griffin's sentence. Though we, and the Illinois Supreme Court, may give weight to such a statement, it is not conclusive. *Raygoza v. Hulick*, 474 F.3d 958, 964 (7th Cir. 2007) (stating that where the same judge presides over both the postconviction proceeding and trial, "we cannot accept as conclusive the judge's statement that the new evidence would not have made any difference"). The question is not whether a particular judge would have imposed a different sentence, but rather whether there was a "reasonable probability" that the sentence would have been different. In assessing that probability we conduct an objective evaluation of the evidence. *Id.* at 964-65.

Griffin v. Pierce, No. 09-3138 (7th Cir. 2010) (Slip Op. 28) (App. A at 29)

Thus, as in *Richter*, the Seventh Circuit reviewed the claim under the *Strickland* analysis without regard for the strictures imposed by the AEDPA. But, *Richter* unequivocally prohibits such review. 2011 U.S. LEXIS 912, *27. Rather than conducting a *Strickland* analysis, the questions on habeas review are *supposed* to be: whether the arguments or theories supported the state court's decision; and whether it is possible fairminded jurists could disagree that those arguments or theories were inconsistent with *Strickland*. *Richter*, at *28-29. But, the Seventh Circuit, in its rush to "conduct an objective

evaluation of the evidence," overlooked the AEDPA and failed to "ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Id.* at *31-32.

As in *Richter,* the Seventh Circuit completely ignored the deference demanded by the AEDPA. Thus, this Court should grant certiorari to address this urgent problem and to resolve the conflict among the circuits.

CONCLUSION

For the reasons set forth, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully Submitted,

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